Bank Pembangunan (M) Bhd v Mohamed Mohaideen bin Kassim Mohamed & Ors and another case

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN PERSONAM NOS 27–18–04 OF 2012 AND 27–19–04 OF 2012
NALLINI PATHMANATHAN J
11 NOVEMBER 2013

Civil Procedure — Summary judgment — Application for summary judgment — Banking facilities — Granted by plaintiff to its customers — Financing purchase of vessels — Customers defaulted in repayments — Judgment obtained against customers vide an in rem writ — Action against defendants as guarantors — Whether defendant had raised triable issues — Whether present suits against guarantors premature and wrong in law as customers not named as defendants — Whether plaintiff exhausted all legal avenues to recover monies due prior to initiating suits against guarantors — Whether summary judgment ought to be entered against defendants

This was an application for summary judgment by the plaintiff ('the bank') against the three defendants who are the guarantors for banking facilities granted by the bank to its customers, namely Menara Tankers Sdn Bhd and Menara Dua Sdn Bhd ('customers'). The facility was granted to the customers for the purpose of part financing the purchase of two vessels namely Menara Satu and Menara Dua, respectively. The customers defaulted in the repayments due under the facilities, as a consequence of which those facilities were terminated. The plaintiff initiated an action against the customers vide an in rem writ action and it being unopposed, obtained judgment on 31 March 2013 which remains unsatisfied. Letters of demand were duly issued to the guarantors requiring the repayment of the said debt, but to no avail. Accordingly, this writ was filed on 22 April 2013. The bank had, subsequent to the filing of the writs relating to this application, received some monies in respect of the sale of Menara Dua. The first defendant ('D1') contended that the defendants ought to have been accorded the benefit of the valuation report in relation to the sale of the two vessels in order that the guarantors could seek the advice of valuers in the marine area. The denial of such an opportunity amounts to a triable issue warranting a trial. D1 further contended that the bank had failed to carry out periodic valuations of the vessel in accordance with cl 27 of the asset purchase agreements, which in turn had been detrimental to the guarantors. The second defendant ('D2') and third defendant ('D3') submitted that the present suits against the guarantors were premature and wrong in law because the customers were not named as one of the defendants. Further, it was contended that the bank ought to have exhausted all legal

avenues to recover the monies due under the loan facilities afforded prior to initiating suits against these guarantors. A

Held, allowing the plaintiff's application:

(1) The guarantor was only entitled to challenge the disposal of the security once he had met his obligations under the guarantee in full. More significantly, the entire process related to the sale of the vessels, namely the valuation reports as well as the cause papers related to the sale and all applications pertaining to the same were served on the customers. In this context it was pertinent that the guarantors here were the directors of the customers. Notwithstanding this, no attempt was made to intervene or participate in the sale process. Given these circumstances, it was not open to the guarantors to now contend by way of a bare averment, that the valuation was flawed, or that the vessels were sold at an undervalue (see para 10(a)). B C D

(2) Clause 27 as drafted protects the bank's interests by allowing it to demand for additional security. Further and in any event, this clause comprised a part of the asset purchase agreements, not the guarantee. It could not therefore be availed of by the guarantors in an effort to avoid their obligations which were stipulated expressly under the terms of the guarantees (see para 10(b)). E

(3) The vessels were not sold prior to the initiation of the suits against the guarantors. If indeed that had been the case then cl 8 would had come into play and the bank would be bound to make a demand and initiated a suit for only the balance sum due and owing. In such an instance the bank could not hope to 'amend' its claim by way of affidavit evidence alone. However in the instant case, the writs were filed before the sale of the vessels. The bank was therefore correctly seeking judgment against the guarantors for a lesser sum in the Menara Dua suit. It was in order for the bank to do so by filing an affidavit, as this related primarily to events occurring subsequent to the issuance of the writs. Hence, there had been no contravention of cl 8 of the guarantees as the said clause was inapplicable (see para 10(c)). F G H

(4) The bank had in fact instituted a claim against the customers which it commenced as in rem actions in order to enforce the security it enjoyed, namely the mortgage on the each of the two vessels, Menara Satu and Menara Dua. The bank however could not credit the guarantors with the proceeds of sale of the same because the sale process was not complete prior to initiation of the actions against the guarantors. Further, the guarantors were the directors of the customers and as such were fully aware of the status of matters as they proceeded. In point of fact, the guarantors as directors wrote to the bank 'surrendering' the vessels on I

arrest. To now contend that they had no knowledge of the in rem actions was therefore not credible (see para 12).

(5) D2's denial and disputing the validity and genuineness of the asset sale agreements, the guarantees, and all documentation in relation to the grant of banking facilities to the customers simply amounted to bare denials and afforded no real defence to the bank's claims (see para 13).

(6) The notice of demand was issued to the guarantors and was sent to the guarantors prior to the initiation of the subject suits. D2's reliance on ss 101 and 103 of the Evidence Act 1950 ('Act') in the application was misconceived, given that the provisions of the Act were not applicable to affidavit evidence. Equally, D2's reliance on s 90A of the Act to dispute the validity of the statement of account issued by the bank was misplaced as the defendants here had expressly contracted (in cl 12 of the guarantees) to the effect that the issuance of such a certificate amounts to evidence of their indebtedness (see para 14).

(7) The bank was therefore entitled to judgment against the guarantors. As the two vessels comprising the security for the loan facilities afforded by the bank had in fact been sold and the priorities settled (for) well after the initiation of suits against the guarantors, it was only correct that the defendants, D1, D2 and D3 as guarantors were given the benefit of such sale in relation to the judgment to be entered against them (see para 15).

[Bahasa Malaysia summary

Ini adalah permohonan untuk penghakiman terus oleh plaintif ('bank') terhadap tiga defendan yang merupakan pejamin untuk kemudahan-kemudahan perbankan yang diberikan oleh bank kepada pelanggannya, iaitu Menara Tankers Sdn Bhd dan Menara Dua Sdn Bhd ('pelanggan-pelanggan'). Kemudahan itu telah diberikan kepada pelanggan-pelanggan bagi tujuan sebahagian daripada pembiayaan belian dua kapal iaitu Menara Satu dan Menara Dua, masing-masingnya. Pelanggan-pelanggan telah teringkar dalam menjelaskan bayaran balik yang patut dibayar di bawah kemudahan-kemudahan itu, dan akibatnya kemudahan-kemudahan tersebut telah ditamatkan. Plaintif telah memulakan tindakan terhadap pelanggan-pelanggan itu melalui tindakan writ in rem dan oleh kerana ia tidak dibantah, penghakiman telah diperoleh pada 31 Mac 2013 yang masih belum dilaksanakan. Surat-surat tuntutan telah pun dikeluarkan kepada penjamin-penjamin yang menghendaki mereka membayar balik hutang tersebut, tetapi tidak mendapat jawapan. Oleh demikian, writ ini telah difailkan pada 22 April 2013. Bank tersebut telah, berikutan pemfailan writ-writ berkaitan permohonan ini, menerima wang berkaitan jualan Menara Dua. Defendan pertama ('D1') berhujah bahawa defendan-defendan patut diberikan Khidmat laporan penilaian berhubung dengan jualan dua kapal itu agar penjamin-penjamin boleh meminta nasihat penaksir-penaksir dalam

bidang perkapalan. Penafian peluang sebegini menjadikannya isu yang patut dibicarakan dan mewajarkan perbicaraan. D1 selanjutnya berhujah bahawa bank tersebut gagal melakukan penilaian berkala ke atas kapal menurut klausa 27 perjanjian jualan aset, yang mana memberi kesan yang memudaratkan kepada penjamin-penjamin. Defendan kedua ('D2') dan defendan ketiga ('D3') berhujah bahawa guaman-guaman ini terhadap penjamin-penjamin adalah pramatang dan salah di sisi undang-undang kerana pelanggan-pelanggan itu tidak dinamakan sebagai salah seorang daripada defendan. Selanjutnya, adalah dihujahkan bahawa bank tersebut patut menggunakan semua cara yang sah untuk mendapat balik wang yang patut dibayar di bawah kemudahan-kemudahan pinjaman yang ada sebelum memulakan guaman-guaman terhadap penjamin-penjamin tersebut.

Diputuskan, membenarkan permohonan plaintif:

(1) Penjamin hanya berhak mencabar jualan cagaran setelah dia memenuhi tanggungjawabnya di bawah jaminan itu sepenuhnya. Lebih ketara, keseluruhan proses berkaitan jualan kapal-kapal itu, iaitu laporan-laporan penilaian dan juga dokumen guaman berkaitan jualan dan semua permohonan berkaitan perkara yang sama telah disampaikan ke atas penjamin-penjamin. Dalam konteks ini adalah penting agar penjamin-penjamin di sini adalah pengarah-pengarah kepada pelanggan-pelanggan itu. Walapun begitu, tiada usaha telah dilakukan untuk campur tangan atau terlibat dalam proses jualan. Berdasarkan keadaan berikut, ia tidak terbuka untuk penjamin-penjamin sekarang untuk berhujah melalui penegasan semata-mata, bahawa penilaian itu telah dibega, atau bahawa kapal-kapal itu telah dijual di bawah nilai pasaran (lihat perenggan 10(a)).

(2) Klausa 27 sebagaimana digubal melindungi kepentingan bank dengan membenarkannya menuntut untuk cagaran tambahan. Selanjutnya dan dalam apa-apa keadaan, klausa ini mengandungi sebahagian daripada perjanjian-perjanjian jualan aset, bukan jaminan. Oleh itu penjamin-penjamin usaha untuk mengelak daripada tanggungjawab mereka yang telah ditetapkan dengan nyata di bawah terma-terma berhubung penjamin-penjamin (lihat perenggan 10(b)).

(3) Kapal-kapal itu tidak dijual sebelum guaman-guaman dimulakan terhadap penjamin-penjamin tersebut. Jika itu kesnya maka klausa 8 adalah terpakai dan bank tersebut adalah terikat untuk membuat tuntutan dan memulakan guaman hanya untuk baki jumlah yang patut dibayar dan terhutang. Dalam keadaan sedemikian bank tersebut tidak boleh 'amend' tuntutannya melalui keterangan afidavit sahaja. Walau bagaimanapun dalam kes ini, writ-writ tersebut telah difailkan sebelum jualan kapal-kapal tersebut. Oleh itu bank tersebut adalah betul untuk memohon penghakiman terhadap penjamin-penjamin bagi jumlah yang

lebih kurang dalam guaman Menara Dua. Adalah wajar untuk bank tersebut berbuat demikian dengan memfailkan afidavit, kerana ini berkaitan dengan kejadian-kejadian terutamanya yang berlaku berikutan keluaran writ-writ tersebut. Justeru, tidak ada pelanggaran klausa 8 berhubung jaminan-jaminan itu tersebut kerana fasal itu tidak terpakai (lihat perenggan 10(c)).

(4) Bank tersebut telah memulakan tuntutan terhadap pelanggan-pelanggan itu yang mana ia dimulakan sebagai tindakan-tindakan in rem bagi tujuan menguatkuasakan cagaran yang dinikmatinya, iaitu gadaian ke atas setiap daripada dua kapal itu, Menara Satu dan Menara Dua. Bank tersebut bagaimanapun tidak boleh mengkreditkan penjamin-penjamin dengan hasil jualan kapal-kapal tersebut kerana proses jualan tidak selesai sebelum tindakan-tindakan tersebut dimulakan terhadap penjamin-penjamin itu. Selanjutnya, penjamin-penjamin adalah pengarah-pengarah kepada pelanggan-pelanggan itu dan oleh itu menyedari kedudukan hal perkara yang berlaku. Berdasarkan fakta, penjamin-penjamian sebagai pengarah-pengarah telah menulis kepada bank tersebut 'surrendering' kapal-kapal tersebut yang ditahan. Untuk berhujah sekarang bahawa mereka tiada pengetahuan tentang tindakan-tindakan in rem itu tidak boleh dipercayai (lihat perenggan 12).

(5) Penafian D2 yang mempertikaikan kesahan dan ketulenan perjanjian-perjanjian jualan aset, jaminan-jaminan, dan semua dokumentasi berkaitan pemberian kemudahan-kemudahan perbankan kepada pelanggan-pelanggan jelas dianggap penafian kosong dan bukan pembelaan untuk tuntutan bank (lihat perenggan 13).

(6) Notis tuntutan telah dikeluarkan kepada penjamin-penjamin dan telah diserahkan kepada penjamin-penjamin sebelum guaman-guaman dimulakan. Kebergantungan D2 kepada ss 101 dan 103 Akta Keterangan 1950 ('Akta') dalam pemohonan itu telah disalah tanggap, berdasarkan peruntukan-peruntukan Akta yang tidak terpakai kepada keterangan afidavit. Juga, kebergantungan D2 kepada s 90A Akta untuk mempertikaikan kesahan penyata akaun yang dikeluarkan oleh bank tersebut tidak betul kerana defendan-defendan jelas menyatakan dalam kontrak (dalam fasal 12 kepada jaminan-jaminan) berhubung keluaran sijil sedemikian adalah dianggap sebagai bukti keberhutangan mereka (lihat perenggan 14).

(7) Bank tersebut berhak kepada penghakiman terhadap penjamin-penjamin. Oleh kerana kedua-dua kapal tersebut merupakan jaminan untuk kemudahan-kemudahan pinjaman yang diberikan oleh bank tersebut telah pun dijual dan keutamaan dijelaskan selepas guaman-guaman terhadap penjamin-penjamin dimulakan, adalah wajar untuk defendan-defendan, D1, D2 dan D3 sebagai penjamin-penjamin

diberikan manfaat terhadap jualan itu berkenaan penghakiman yang telah dimasuki terhadap mereka (lihat perenggan 15).] A

Notes

For cases on application for summary judgment, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8503–8505. B

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH trading) & Anor [2006] 2 MLJ 685, FC (refd)

United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206, FC (refd) C

Legislation referred to

Evidence Act 1950 ss 90A, 101 103

Rules of Court 2012 O 70 D

Jeremy Joseph (Vinothini with him) (Joseph & Partners) for the plaintiff.
KC Ramanathan (Kumar Associates) for the first defendant.
KT Ng (Chris Lim Ting & Partners) for the second and third defendants.

Nallini Pathmanathan J: E

INTRODUCTION F

[1] This is an application for summary judgment by the plaintiff, Bank Pembangunan Malaysia Bhd ('the bank') against the three defendants who are guarantors for banking facilities granted by the bank to its customers, namely Menara Tankers Sdn Bhd and Menara Dua Sdn Bhd ('customers'). The facility G was granted to the customers for the purpose of part financing the purchase of two vessels namely Menara Satu and Menara Dua respectively. The customers defaulted in the repayments due under the facilities, as a consequence of which those facilities were terminated. The plaintiff initiated an action against the customers vide an in rem writ action and it being unopposed, duly obtained H judgment on 23 November 2012, which remains unsatisfied.

[2] Although there are two summary judgment applications premised on two writs, as the facts are similar, the decision in one case will bind the other.

I

SALIENT BACKGROUND FACTS

[3] The defendants here were at all material times, and remain, the common directors of the customers. At the customers' request, the bank granted each of

the customers a term-financing banking facility under the Shariah principle of *Bai'Istisna* to part finance the purchase of the two vessels ('the banking facilities'). The terms and conditions of such facilities are set out firstly in two letters of offer dated 26 September 2007 and 4 July 2008 respectively followed by two asset purchase agreements dated 19 October 2007 and 28 July 2008 for Menara Tankers Sdn Bhd and Menara Dua Sdn Bhd respectively.

The banking facilities were secured, inter alia, by:

(a) a first preferred statutory mortgage over the two vessels respectively; and

(b) a joint and several guarantee dated 19 October 2007 for Menara Tankers Sdn Bhd and on 28 July 2008 for Menara Dua Sdn Bhd respectively.

[4] The full particulars of the two asset purchase transactions and the relevant security have been fully set out in tabular form in the plaintiff's submissions as well as its affidavits in support of the summary judgment applications and I do not propose to reproduce the same here.

[5] As the applications here are premised on the contracts of guarantee, it is relevant to consider the nature of the guarantees afforded by the defendants to the bank vide the guarantees of 19 October 2007 and 28 July 2008 respectively. Each of these two guarantees was executed by all three defendants. The salient terms of the guarantees include:

(a) A joint and several undertaking on the part of the three defendants, both unconditionally and irrevocably to pay the bank the 'sale price' together with all monies due and owing by the customers under the banking facilities, as principal debtors (see cl 2). In this context, the definition of 'sale price' is as set out in the asset purchase agreement, namely RM60,705,103.20 for Menara Tankers Sdn Bhd and RM58,824,311.04 for Menara Dua Sdn Bhd.

(b) A clause to the effect that the plaintiff is entitled to demand repayment in full from the defendants as guarantors and principal debtors.

(c) A clause to the effect that a statement of account showing the indebtedness of the customers and duly certified, amounts to conclusive evidence of the indebtedness of the customers to the plaintiff.

[6] The customers duly utilised the facilities to finance the purchase of the vessels, but defaulted in the repayment terms. Despite letters of demand being issued there was no regularisation of the account, resulting in the facilities being terminated and recalled. As of the date of termination (vide the bank's solicitors' letters of 25 April 2012) the quantum due and owing was RM51,253,946.57 for Menara Tankers Sdn Bhd and RM56,909,184.80 for Menara Dua Sdn Bhd.

[7] Letters of demand were duly issued to the guarantors requiring the repayment of the said debt, but to no avail. Accordingly this writ was filed on 22 April 2013.

[8] Prior to this, the bank had commenced an in rem action against the vessels Menara Satu and Menara Dua and obtained judgment against the customers for the sums of RM53,809,275.33 and RM59,222,080.22 respectively, as of 31 March 2013. This judgment was not satisfied by the customers.

[9] The bank had already commenced the procedure for the sale of the two vessels prior to this date, as no security was afforded and no defence filed by the customers. However as of the commencement of the current writs relating to the guarantors, the bank had received no proceeds of sale in respect of either of the vessels. The bank has however, subsequent to the filing of the writs relating to this application, received some monies in respect of the sale of Menara Dua on 10 September 2013.

ARE THERE 'TRIABLE' ISSUES?

[10] The first defendant ('D1') raised the following issues which he maintained were 'triable' or warranted this matter going to trial:

(a) D1 contends that the defendants ought to have been accorded the benefit of the valuation report in relation to the sale of the two vessels in order that the guarantors could seek the advice of valuers in the marine area. In essence it is contended that the plaintiff failed to procure the best price for the vessel, as the purchase price of the vessel was RM39m while the sale price was RM12.042m after a period of only five years. It is contended that the guarantors ought to have been given the opportunity to sell the vessel. The denial of such an opportunity it is contended amounts to a triable issue warranting a trial.

In response to this, the bank points out that the sale of the ship and therefore the appraisal or valuation of both vessels was undertaken at the behest of the Sheriff of the High Court (upon the application of the bank) in accordance with the procedure prescribed under O 70 of the Rules of Court 2012. It received the approval of this court. The bank was forced to accept the highest bid which was the said RM12.042m. The bank also points out that it is in the bank's interests to obtain the highest possible value for the vessel as the amount outstanding under the loan facilities is significantly large.

Having considered the issue it is clear to this court that this does not comprise a 'triable' issue. The guarantor is only entitled to challenge the disposal of the security once he has met his obligations under the guarantee in full. More significantly, the entire process relating to the sale

of the vessels, namely the valuation reports as well as the cause papers relating to the sale and all applications pertaining to the same were served on the customers. In this context it is pertinent that the guarantors here are the directors of the customers. Notwithstanding this, no attempt was made to intervene or participate in the sale process. Given these circumstances, it is not open to the guarantors to now contend by way of a bare averment, that the valuation was flawed, or that the vessels were sold at an undervalue.

(b) It is contended for the first defendant that the bank has failed to carry out periodic valuations of the vessel in accordance with cl 27 of the asset purchase agreements, which in turn has been detrimental to the guarantors.

A perusal of cl 27 of the asset purchase agreements however discloses that it is a clause pertaining to the valuation of the vessels periodically, at the bank's behest, to enable the bank to periodically check whether the security the vessels afford are sufficient to meet the loans afforded. The clause specifies that the bank may carry out a valuation of the vessels annually or at such interval as the bank determines. In the event such valuation reveals that the forced sale value of the vessel charged has decreased from the date when the security was first granted, then the bank has the discretion to require the customer to increase the security afforded for the loan. It is therefore apparent that the first defendant's interpretation of the clause to the effect that the bank is bound to carry out periodic valuations and that the failure to do so is detrimental to the guarantors, is flawed. Clause 27 as drafted protects the bank's interests by allowing it to demand for additional security. Further and in any event, this clause comprises a part of the asset purchase agreements, not the guarantee. It cannot therefore be availed of by the guarantors in an effort to avoid their obligations which are stipulated expressly under the terms of the guarantees. I therefore conclude that this issue does not therefore comprise a 'triable' issue.

(c) D1 relies on cl 8 of the guarantees which stipulates that in the event of the bank exercising its rights of sale, and the proceeds of such sale (after deducting all expenses) being insufficient to pay all monies due and owing to the bank then the guarantors, upon a demand being made, are liable to pay the sum representing the difference between the net proceeds and the quantum due and owing to the bank. D1's complaint is that no 'new' demand was made upon the guarantors after the vessels were sold and that the present claim against the guarantors is therefore bad or invalid.

It is evident from a consideration of cl 8 of the guarantees that it envisages that if the sale of the vessels is complete, such that the bank has received the net proceeds of sale and an action against the guarantors is then contemplated, a demand has to be issued prior to the initiation of such an

action against them. In other words it stipulates for a demand to be sent to the guarantors after the sale of the security (ie the vessels) for the balance sum due and owing, in the event no action has been initiated against them by the bank up to that date.

The current factual matrix is however somewhat different. The writs against the guarantors were issued on 22 April 2013. The bank, prior to issuance of these writs, issued a demand to the guarantors dated 31 March 2013. There is nothing to preclude the bank from initiating action against the customers and the guarantors prior to the completion of the sale of the security, namely the two vessels. In the instant case the sale of the vessels was on 30 April 2013 for Menara Dua, and 30 July 2013 for Menara Satu. In other words the sale effected after the issuance of the writs against the guarantors. The sale process moreover was not over by 30 April 2013 or 30 July 2013. In accordance with the procedures for sale of the vessels under O 70 of the Rules of Court 2012 several issues relating to priority etc remained to be effected even after the date of sale. The sale proceeds for Menara Dua were received on 10 September 2013 while for Menara Satu, the order for priorities was only granted on the date of this hearing, namely 25 October 2013. As such it is clear that the bank could not have issued any new demand against the guarantors after the sale with the purpose of initiating an action, as such action had already been instituted as of 22 April 2013. In other words cl 8 is simply inapplicable. As matters stand the bank has credited the guarantors with the sale proceeds for Menara Dua (as only this has been received) and seeks judgment in a lower sum from the guarantors in respect of that suit. D1 contends that this cannot be done, citing *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206, maintaining that the bank cannot seek to improve its pleadings by way of affidavit evidence. However it must be pointed out that the bank is not seeking to improve its claim by way of affidavit evidence.

The vessels were not sold prior to the initiation of the suits against the guarantors. If indeed that had been the case then cl 8 would have come into play and the bank would be bound to make a demand and initiate a suit for only the balance sum due and owing. In such an instance the bank could not hope to 'amend' its claim by way of affidavit evidence alone. However in the instant case, as I have pointed out, the writs were filed before the sale of the vessels. The bank is therefore correctly seeking judgment against the guarantors for a lesser sum in the Menara Dua suit. It is in order for the bank to do so by filing an affidavit, as this relates primarily to events occurring subsequent to the issuance of the writs. By way of analogy, if for example the bank had obtained judgment against the guarantors prior to the sale of the vessels and then sold the vessels, the bank would only seek execution against the guarantors for the balance sum due and owing, after deduction of the proceeds recovered from the sale of the vessels, notwithstanding that the judgment is for a larger sum.

In these circumstances, I am satisfied that there has been no contravention of cl 8 of the guarantees as the said clause is inapplicable. Therefore this too does not comprise a 'triable' issue.

[11] The second defendant ('D2') and third defendant ('D3') relied on their counsel's written submissions to maintain that there were 'triable' issues. A reading of the same discloses that D2 and D3 essentially put the bank to proof of virtually every paragraph of the claim, essentially therefore denying each and every paragraph of the bank's statement of claim. It would serve no useful purpose to set out each paragraph in turn, as none of these matters raises an independent defence. Suffice to state that it is beyond dispute that the bank did indeed afford banking facilities to the customers according to the Shariah principle of *Bai'Istina* in the sums as set out above and as I have detailed at the outset.

[12] D2 and D3 also submitted that the present suits against the guarantors are premature and wrong in law because the customers were not named as one of the defendants. Further it was contended that the bank ought to have exhausted all legal avenues to recover the monies due under the loan facilities afforded prior to initiating suits against these guarantors. However this is not a tenable point as the bank has in fact instituted a claim against the customers which it commenced as in rem actions in order to enforce the security it enjoyed, namely the mortgage on the each of the two vessels, Menara Satu and Menara Dua. The bank however could not credit the guarantors with the proceeds of sale of the same (as I have explained above) because the sale process was not complete prior to initiation of the actions against the guarantors. This issue therefore does not constitute a 'triable' issue. Further and in any event the bona fides of such a contention is seriously in doubt as the guarantors are directors of the customers and as such were fully aware of the status of matters as they proceeded. In point of fact, the guarantors as directors wrote to the bank 'surrendering' the vessels on arrest. To now contend that they had no knowledge of the in rem actions is therefore not credible.

[13] D2 also sought to deny and dispute the validity and genuineness of the asset sale agreements, the guarantees, and in effect any and all documentation in relation to the grant of banking facilities to the customers here. These averments made by way of affidavits in reply simply amount to bare denials and afford no real defence to the bank's claims here.

[14] D2 contends that the bank failed to exhibit that a notice of demand was issued to the guarantors. It is however evident from the demands issued by the bank's solicitors in each suit (which demands are exhibited in the affidavits in support of the applications for summary judgment) that the demands were sent by way of registered post to the guarantors. I am therefore satisfied that

demands were sent to the guarantors prior to the initiation of the subject suits. D2's reliance on ss 101 and 103 of the Evidence Act 1950 in this application is misconceived, given that the provisions of the Evidence Act are not applicable to affidavit evidence. Equally D2's reliance on s 90A of the Evidence Act to dispute the validity of the statement of account issued by the bank is misplaced as the defendants here have expressly contracted (in cl 12 of the guarantees) to the effect that the issuance of such a certificate amounts to evidence of their indebtedness, (see *Cempaka Finance Bhd v Ho Lai Ying & Anor* [2006] 2 MLJ 685).

Having read D2 and D3's submissions as a whole, I am satisfied that no triable issues were raised.

[15] The bank is therefore entitled to judgment against the guarantors. As the two vessels comprising the security for the loan facilities afforded by the bank have in fact been sold and the priorities settled (only today for Menara Satu) well after the initiation of suits against the guarantors, it is only correct that the defendants here, namely D1, D2 and D3 as guarantors are given the benefit of such sale in relation to the judgment to be entered against them. At the hearing of this application the bank provided the outstanding sum due and owing in respect of each suit. The bank is directed through its solicitors to file an affidavit to this effect.

[16] Therefore taking into account the net proceeds of sale available to the bank upon settlement of all other priorities, the bank is entitled to and hereby granted:

(a) judgment in the sum of RM50,076,862.47 against the defendants jointly and severally in respect of Kuala Lumpur High Court In Personam Action No 27–18–04 of 2013; and

(b) judgment in the sum of RM50,559,541.18 against the defendants jointly and severally in respect of Kuala Lumpur High Court In Personam Action No 27–19–04 of 2013.

Plaintiff's application allowed.

Reported by Ashgar Ali Ali Mohamed